No. 357.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MAX ENDELMAN and EDWARD LORD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

TRANSCRIPT OF RECORD.

In Error to the District Court of the United States for the District of Alaska.

INDEX.

United States,
District of Alaska. } ss.

Pleas and proceedings begun and held in the District Court of the United States for the District of Alaska at the adjourned November term, 1896.

Present: The Honorable ARTHUR K. DELANEY, Judge.

THE UNITED STATES OF AMERICA, DISTRICT OF ALASKA.

In the District Court of the United States for the District of Alaska.

THE UNITED STATES OF AMERICA,

vs.

MAX ENDLEMAN and EDWARD LORD.

23 U. S. Statutes at Large, Chapter 53, Section 14.

Indictment.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand

eight hundred and ninety-six, begun and held at Juneau, in said District, commencing on the 9th day of November, 1896.

The Grand Jurors of the United States of America, selected, impaneled, sworn, and charged within and for the District of Alaska, accuse Max Endleman and Edward Lord by this indictment of the crime of unlawfully selling intoxicating liquors within said district, committed as follows:

The said Max Endleman and Edward Lord at or near Juneau within the said District of Alaska, and within the jurisdiction of this Court, on or about the 7th day of December, in the year of our Lord one thousand eight hundred and ninety-six, and at divers other times before, did unlawfully and willfully sell to John Doe and Richard Roe and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor, called whisky, to-wit, one glass, pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors aforesaid unknown, without having first complied with the law concerning the sale of intoxicating liquors in the District of Alaska.

And so the Grand Jurors duly selected impaneled, sworn, and charged as aforesaid upon their oaths do say, that Max Endleman and Edward Lord did then and there unlawfully sell intoxicating liquors in the manner and form aforesaid to the said John Doe and Richard Roe, and to divers other persons, whose real names are to the

Grand Jurors aforesaid unknown, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

BURTON E. BENNETT,
United States District Attorney.

[Endorsed]: No. 612. United States of America vs. Max Endleman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. A true bill. Edward de Groff, Foreman of Grand Jury. Witnesses examined before the Grand Jury: C. W. Young, Karl Koehler, Fred Heyde, S. M. Graf. Filed Dec. 8, 1896. Charles D. Rogers, Clerk. Burton E. Bennett, U. S. Attorney.

And afterwards, to-wit, on the 8th day of December, 1896, a bench warrant was issued which is in words and figures following, to-wit:

Bench Warrant.

United States of America, }
District of Alaska. } ss.

The President of the United States of America, to the Marshal of our District of Alaska or his Deputy, Greeting:

Whereas, at a District Court of the United States for the District of Alaska, holden at the city of Juneau, on

the 9 day of November, 1896, the Grand Jurors in and for said district found a true bill of indictment against Max Endleman and Edward Lord for the crime of unlawfully selling intoxicating liquors in the district of Alaska, against the form of the Statutes of the United States in such cases made and provided, as by the said indictment now remaining on file, and of record in said court more fully appears. Now, therefore, you are hereby commanded to forthwith apprehend the said Max Endleman and Edward Lord if they may be found in your district, and them bring before the said Court, at the courtrooms thereof, in the city of Juneau, to answer the indictment aforesaid.

Hereof fail not; and make due return of this writ with your doings thereon, into our said court.

Witness, the Honorable ARTHUR K. DELANEY Judge of said District Court, and the seal thereof affixed this 8 day of December, A. D. 1896.

[Seal] CHARLES D. ROGERS,
Clerk.
By Walton D. McNair,
Deputy.

United States of America,
District of Alaska. } ss.

In obedience to the within warrant I have the body of the said Max Endleman and Edward Lord before the

Honorable District Court of the United States for the District of Alaska, this 8 day of December, 1896.

LOUIS L. WILLIAMS,
Marshal.
By William M. Hale,
Deputy.

[Endorsed]: U. S. District Court, District of Alaska. No. 612. The United States vs. Max Endleman and Edward Lord. Bench warrant. The defendant to be admitted to bail in the sum of ——— dollars. ————, Clerk. Returned and filed Dec. 8, 1896. Charles D. Rogers, Clerk.

And afterwards, to-wit, on the 9th day of December, 1896, the following further proceedings were had and appear of record in said cause to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Arraignment.

Now, at this day comes the plaintiff by Burton E. Bennett, United States Attorney, and the defendants being

personally present, and their counsel, C. S. Blackett, Esq., and upon arraignment waive the reading of the indictment, and upon request of counsel are given until Thursday, December 10, 1896, at 10 o'clock A. M. to plead to the indictment.

And afterwards, to-wit, on December 10, 1896, defendants filed their motion to quash, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

United States of America, } ss.
District of Alaska. }

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD,
Defendants.

23 U. S. Statutes at Large, Chapter 53, Section 14.

Motion to Quash Indictment.

Comes now the above-named defendants and move the Court to quash the indictment returned against them, No. 612, upon the following grounds:

1. That two or more offenses are charged in the same count and same indictment.

2. That the indictment is fatally defective for duplicity.

3. That two or more offenses are charged in the same indictment in the same count against two defendants without segregating the offenses committed by each defendant.

4. That the indictment is too vague, indefinite, and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defense.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendants' Attorneys.

I, Max Endleman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action, and that the foregoing motion to quash is true as I verily believe.

Subscribed and sworn to before me this —— day of December, 1896.

———— ————,
Notary Public for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska, U. S. of America, Plaintiff, vs. Max Endleman and Edward Lord, Defendants. Motion to quash. Filed Dec. 10, 1896. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on December 12, 1896, the following proceedings were had and appear of record in said cause to-wit:

UNITED STATES, Plaintiff,
vs. } No. 612.
MAX ENDLEMAN and EDWARD LORD, Defendants.

Order Denying Motion to Quash Indictment.

Now, at this day comes the plaintiff by Burton E. Bennett, U. S. Attorney, and the defendants by their attorneys, and the motion to quash the indictment coming on to be heard and being argued by counsel, and the Court being sufficiently advised in the premises, denies said motion, to which ruling the defendants now except.

And afterwards, to-wit, on said December 12, 1896, defendants filed a demurrer, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Demurrer to Indictment.

Comes now the above-named defendants and demur to the indictment rendered against them in the above-entitled court and cause upon the following grounds, to-wit:

1. That the Court has no jurisdiction over the subject matter of the action.

2. That more than one crime is charged in the indictment against the defendants in the same count.

3. That the facts stated in the indictment do not constitute a crime, or any crime, against the defendants, or either of them.

CREWS, HANNUM & IVEY,
Defendants' Attorneys.

I, Max Endleman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants

in the above-entitled action; and that the foregoing demurrer is true as I verily believe.

Subscribed and sworn to before me this —— day of December, 1896.

———— ————,
Notary Public for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. U. S. of America, Plaintiff, vs. Max Endleman and Edward Lord, Defendants. Demurrer. Filed Dec. 12, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,
vs. No. 612.
MAX ENDLEMAN and EDWARD LORD, Defendants.

Order Overruling Demurrer.

The demurrer filed herein coming on to be heard, and the Court being fully advised in the premises, overrules said demurrer, to which ruling defendants now except.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Plea.

Now, at this day comes the plaintiff by Burton E. Bennett, United States Attorney, and the defendants each being personally present, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, enter a plea of not guilty to the indictment.

And afterwards, to-wit, on said December 12, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Trial.

This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally present in court, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, the venire of the petit jury was called by the clerk, and the same being exhausted and the requisite number of qualified jurors not having been obtained, it is ordered that this cause be continued until Monday, December 14, 1896, at 10 o'clock A. M.

And afterwards, to-wit, on December 14, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,

Plaintiff,

vs.

No. 612.

MAX ENDLEMAN and EDWARD LORD,

Defendants.

Trial (Continued).

Come again the parties hereto, the plaintiff appearing by Burton E. Bennett, U. S. Attorney, and each of the defendants being personally present, and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, the clerk proceeded to call the special venire of the petit jury, and the jurors being sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues:

Nicholas Bolshanin,	J. T. Yager,
Peter Callsen,	Frank Howard,
Pete Skogland,	J. J. Rutledge,
John McCormick,	W. D. McLeod,
Wm. Wilheim,	Chas. Boyle,
James G. Smith,	Oscar Cling.

The evidence being heard, the cause being argued by

counsel, the jury was charged by the Court, and retired for deliberation in charge of a sworn officer.

And afterwards, to-wit, on December 15, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.
No. 612.

Trial (Continued).

Comes again the plaintiff by Burton E. Bennett, United States Attorney, and the defendants by their attorneys, as also come the jury heretofore impaneled and sworn herein, in charge of their sworn bailiff, and being called by the clerk, under the direction of the Court, and all answering to their names, and report to the Court that they are unable to agree upon a verdict.

Whereupon it is ordered by the Court that they be discharged from further service in this cause.

And afterwards, to-wit, on December 17, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD, Defendants.

No. 612.

Rehearing.

Now, at this day this cause coming on for a rehearing, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally present and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., the venire of the petit jury was called by the clerk, and the jurors sworn as to their qualifications, and being passed for cause, the following jurors were sworn to try the issues:

Charles Clapp.	Neil McLeod.
Louis Levy.	Jo. Edmonds.
John Williams.	J. F. Bodwell.
J. K. Clark.	L. A. Moore.
John Myers.	W. R. Murdock.
W. C. Meydenbauer.	Adam Corbus.

The evidence being heard, the cause being argued by counsel, the jury was charged by the Court, and retired for deliberation in charge of a sworn officer.

The jury in the above-entitled cause having come into court, and being called by the clerk, and all answering, the plaintiff being represented by Burton E. Bennett, U. S. Attorney, the defendants being personally present and their counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., the jury returned the following verdict:

THE UNITED STATES OF AMERICA, DISTRICT OF ALASKA.

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA,

vs.

MAX ENDLEMAN and EDWARD LORD.

Adjourned November Term, 1896.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant Max Endleman guilty as charged in the indictment, and Edward Lord not guilty.

A. W. CORBUS,
Foreman.

[Endorsed]: No. 612. United States of America vs. Max Endleman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. Verdict. Filed December 17, 1896. Charles D. Rogers, Clerk.

Whereupon the jury are discharged by the Court from further attendance in this cause.

Order Releasing Defendant Edward Lord.

The jury in the above-entitled cause having returned a verdict of not guilty as to the defendant Edward Lord, it is ordered by the Court that he be discharged from custody, and go hence without day.

UNITED STATES,
vs.
MAX ENDLEMAN and EDWARD LORD. } No. 612.

Charge to the Jury.

Gentlemen of the Jury, the Act of Congress provided a civil government for this territory, which is commonly known here as the Organic Act, and which became a law on the 17th day of May, 1884, and has established the government that we have up here in this country, prohibits by expressed enactment the importation, manufacture, and sale of intoxicating liquors in this district.

The indictment in this case charges the defendants, Max Endelman and Mr. Lord, with having violated this provision of the law. It is not for you to pass upon the sufficiency of that indictment; that is entirely for the Court, and the Court instructs you that within the alle-

gations of that indictment, if you believe from this evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska contrary to this law, then the defendants are guilty as charged in that indictment. The fact that it was a glass, pint or quart cuts no figure, as the law authorizes the allegation to be made in that way.

Now, in order to authorize a conviction, you want to direct your attention to three propositions: First. Has there been a sale? Second. Was the sale an intoxicating liquor? And third. Was it sold by these defendants, or either of them in person or through any agent, servant or employee?

A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is the transfer of any kind of property from one person to another person for current money of the United States.

I charge you that if you find that a sale was made and that the sale was the liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors.

Now, as to the sale by these defendants. You may under this indictment and this evidence if you think the evidence warrants it, after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in this case.

Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his servant or employee: That principle applies to a proprietor who has charge of a manufacture and also any institution where intoxicating liquors are sold; he is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee. I charge you further that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes, he is the servant, agent, or employee of the proprietor of the establishment and if either the bartender or the waiter have carried or furnished drinks to any person or customers in that house, that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment.

Now, in view of the offer of Mr. Crews, in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled, and that you do not misapprehend the law in that regard. The license which is granted under the Internal Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They therefore give to liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer

without having put up his money and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without the license; so, therefore, the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the statute now under consideration.

You have a right in considering this evidence, and I instruct you, that you must consider it all; if there are any discrepancies, try and reconcile them; if not, come to such a conclusion as the truth points to, and satisfy your mind what are true. And in viewing the testimony you have a right to use your own observation and experience as reasonable and sensible men; you have a right to consider what you know from your own experience of bars and bar fixtures and a saloon outfit is used for. You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers. You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere, the use of the electric bell for the purpose of calling a waiter to order the drinks served. It is a matter of every-day occurrence now, just like the telephone and telegraph through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every-day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony.

It is also your duty to take into consideration the appearance of the witnesses; their apparent candor and fairness in testifying, whether they are unwilling and trying to keep back something in order to shield the defendant or not. You have a right to take into consideration all the opportunities which any witnesses might have had for knowing or seeing the matters he testified to. You have a right to consider the probable or improbable nature of the story which the witness tells, and from the whole of this testimony and your judgment, experience, and observation as reasonable men applied to this evidence arrive at the true facts.

Now, it is true that the defendants are entitled to the benefit of the doubt; this is a criminal prosecution, but you must not be misled as to the nature of that doubt or as to what your duties in connection with any such doubt in weighing this evidence may be. A reasonable doubt is not something you imagine the possibility that the defendant is not guilty or some speculative or chimerical doubt which may have arisen in your minds outside of the evidence, but the doubt must be based upon the testimony in the case, or based upon a want of testimony. It must arise out of this trial itself and the testimony that has been disclosed to you on that trial, or the want of such testimony; in other words, I charge you that in order to make a reasonable doubt you must have in your minds an honest and substantial misgiving founded on the testimony that the defendant is not guilty.

Now, one step further, and I am through. The federal courts allow the Judges sometimes to give an opinion on the evidence.

I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding I charge you that you are the judges of the evidence and from that evidence it is for you to say whether or not they, or either of them, are guilty. You must not forget in this trial, you have no right whatever when you get into the jury room to question any provision of law, or to question this prohibitory liquor law; it is the law of this country, passed by the highest legislative power in the United States, and it is our duty to obey it. The very highest duty of good citizenship is to support the constitution and uphold the laws of the United States, no matter what they may be.

And, gentlemen, if you believe from this evidence that these defendants, or either of them, are guilty, beyond a reasonable doubt, as I have charged you the law to be, you will find them guilty; if you do not so believe you will return a verdict of not guilty.

In addition to that, inasmuch as some reference has been made to the fact that these defendants did not take the witness stand and testify, you will not consider that. The law authorizes them to be sworn if they want to, but if they do not want to be sworn that raises no presumption one way or the other; so you will not consider that fact.

(Counsel for the defendants in open court and in the presence of the jury duly excepted to each and every part of the Court's instructions to the jury and also to the instructions as a whole.)

The Court further instructs the jury:

If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant Endelman, he being the proprietor of the Louvre building, if you so find, then the proprietor is responsible for the acts of the agent or employee, so far as such sales are concerned, and is equally guilty with the employee.

The principal can be convicted under this evidence if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him.

(Excepted to by counsel for defendants.)

And afterwards, to-wit, on December 18, 1896, a motion in arrest of judgment was filed in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Motion in Arrest of Judgment.

Comes now the above-named defendant, Max Endleman, and moves the Court in arrest of judgment upon the following grounds, to-wit:

1st. That the Grand Jury, by which the indictment against the defendants was found had no legal authority to inquire into the crime charged, because the Court has no jurisdiction of the subject matter of the action.

2d. That the facts stated in the indictment do not constitute a crime.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Motion in arrest of judgment. Filed December 18, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterward, to-wit, on said December 18, 1896, a motion for new trial was filed in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Motion for New Trial.

Comes now the above-named defendant, Max Endelman, and moves the Court to set aside the verdict rendered against him in the above-entitled action and to grant a new trial; that this motion is made and based upon the following grounds affecting the substantial rights of this defendant:

1st. Irregularity in the proceedings of the Court during the trial of the defendant, excepted to by the defendant.

2d. Abuse of discretion on the part of the Court in permitting the prosecution to prove, or attempt to prove,

a sale of whisky at any time and to any person within one year prior to the finding of the indictment against the defendant, by which this defendant was prevented from having a fair trial.

3d. Insufficiency of the evidence to justify the verdict.

4th. That the verdict is against law.

5th. Error in law occurring at the trial and excepted to by the defendant.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Motion for new trial. Filed December 18, 1896. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterwards, to-wit, on said December 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES,
Plaintiff,
vs. } No. 612.
MAX ENDLEMAN,
Defendant.

Order Denying Motion in Arrest of Judgment, and for New Trial.

Now, at this time comes the plaintiff, by Burton E. Bennett, U. S. Attorney, and the defendant appearing by counsel, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., present their motion in arrest of judgment and for a new trial, and the Court being fully advised in the premises, denies both said motions.

And afterwards, to-wit, on said December 18, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

UNITED STATES, Plaintiff,
vs.
MAX ENDLEMAN, Defendant.
No. 612.

Judgment.

Now comes the plaintiff, by Burton E. Bennett, U. S. Attorney, as also the defendant in person, with Messrs. Crews, Hannum & Ivey, and C. S. Blackett, Esq., his counsel, and appearing for judgment—

It is ordered, adjudged, and decreed that defendant be and he is hereby convicted of the crime of unlawfully selling intoxicating liquors within the District of Alaska, and sentenced to pay a fine of one hundred dollars, and that he be imprisoned in the jail at Sitka until said fine is paid, for a term not exceeding 60 days.

And afterwards, to-wit, on January 7, 1897, a petition for writ of error was filed in said cause, which is in words and figures following, towit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Petition for Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

To the Honorable ARTHUR K. DELANEY, Judge of the United States District Court for the District of Alaska.

The petition of Max Endleman and Edward Lord shows to this Honorable Court as follows:

1. That your petitioners are the defendants above named; that in said cause there was entered at a term of court held at Juneau, in the District of Alaska, beginning on the 9th day of November 1896, the final judg-

ment entered upon the verdict of a jury on the 18th day of December, 1896, wherein the defendant, Max Endelman, was adjudged to be guilty of violating the prohibitory law prohibiting the manufacture, importation, and sale of intoxicating liquors in the District of Alaska, whereas the defendant, Max Endelman, was adjudged to pay a fine of one hundred dollars ($100.00), and in default of the payment of said fine that he be confined in the penitentiary of Sitka, Alaska, for a period of sixty days (60), which said judgment and proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of complainants, your petitioner; that manifest error has been made in this case in the rendering of said judgment, to the great damage and injury of your petitioner, as the same fully appears from the assignment of errors in bill of exceptions filed herewith.

Wherefore, that in order your petitioner have relief in the premises, and for an opportunity to show the errors complained of, your petitioners pray that they may be allowed a writ of error in said cause, and that upon the giving by your petitioners of a bond, as by law required, all proceedings in this court be suspended and stayed until the determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Judicial District, and that a transcript of the records, proceedings, and all papers in this case duly authenticated may be transmitted to the Honorable Circuit Court of Appeals for the Ninth Judicial District, holding terms in San Francisco, State of California, to determine said writ of error.

MAX ENDELMAN,
Petitioner.

United States of America
District of Alaska. } ss.

Due service of the within petition is hereby accepted in the District of Alaska, this —— day of December, 1896, by receiving a copy thereof, duly certified to as such by C. S. Hannum, one of the attorneys for defendants.

BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for District of Alaska. United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants. Petition for writ of error. Filed January 7, 1897. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews Hannum & Ivey, and C. S. Blackett, Attorneys for petitioners. Office, Juneau, Alaska.

And afterwards, on said date, defendant filed his assignment of errors, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MAX ENDLEMAN and EDWARD LORD,
Defendants.

Assignment of Errors.

Comes now the above-named defendant, Max Endelman, in error in the above-entitled cause, by Messrs. Crews, Hannum & Ivey, and C. S. Blackett, his attorneys and solicitors, and says, that in the records, proceedings, and trial in the above-entitled cause there is manifest error affecting the substantial rights of the defendant to his injury, as follows:

I.

That the Court erred in denying the defendant's motion to quash the indictment returned against him and Edward Lord; to the ruling of the Court denying said mo-

tion this defendant then and there duly excepted, which exception was duly allowed by the Court.

II.

That the Court erred in overruling defendant's demurrer to the indictment; to the overruling of said demurrer the defendant then and there excepted, and his exceptions were duly allowed by the Court.

III.

That the Court erred in denying defendant's motion made at the beginning of the trial to require the district attorney to elect upon what particular sale set forth in the indictment he would rely upon for a conviction in this cause against the defendant; to the ruling of the Court denying said motion, the defendant then and there duly excepted, which exception was duly allowed by the Court.

IV.

That the Court erred in overruling the defendant's objection to the introduction of any testimony on behalf of the Government in this cause, which motion was based upon the ground that the indictment does not state facts sufficient to constitute a crime, and upon the further ground that the defendant had no notice from the indictment upon what charge he would be put upon trial; to this overruling of the objection by the Court defendant duly excepted, which exception was duly allowed.

V.

That the Court erred in allowing the district attorney to introduce testimony tending to prove a sale of intoxicating liquors by the defendant at any time within one year prior to the finding of the indictment; to the order and ruling of the Court the defendant duly excepted, which exception was allowed by the Court.

VI.

That the Court erred in permitting the prosecution to introduce in evidence over the objection of the defendant a printed advertisement, purporting to be an advertisement of the Louvre Theatre, which advertisement appears in the "Mining Record," a newspaper published at Juneau, Alaska; to the overruling of defendant's objection the defendant duly excepted, and the exception was allowed by the Court.

VII.

That the Court erred in denying defendant's motion to discharge the defendant at the time the prosecution rested its case; to the ruling of the Court denying said motion defendant duly excepted, which exception was duly allowed by the Court.

VIII.

That the Court erred in denying defendant's motion to require the district attorney to disclose and elect at the

time he rested the case upon what particular sale, and at what particular time, to what particular person he relied upon for a conviction in this case; to the ruling of the Court denying said motion the defendant duly excepted, and the exception was allowed by the Court.

IX.

The Court erred in refusing to allow the defendant to introduce in evidence a license granted to the defendant, Max Endelman, by the Collector of Internal Revenue for the District of Oregon, of which the District of Alaska forms a part, authorizing the defendant, Max Endelman, to sell and retail spirituous liquors in the town of Juneau, District of Alaska; to the ruling of this Court denying defendant's offer and excluding the testimony offered, the defendant duly excepted, which exception was allowed by the Court.

X.

That the Court erred in giving the following instructions to the jury:

First.—"If you believe from this evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska contrary to this law, then the defendants are guilty as charged in that indictment. That the fact that it was a glass, pint, or quart cuts no figure, as the law authorizes the allegation to be made in that way."

Second.—Now, in order to authorize a conviction, you want to direct your attention to three propositions: First. Has there been a sale? Second. Was the sale an intoxicating liquor? And Third. Was it sold by these defendants, or either of them, in person or through any agent, servant, or employee?"

Third.—A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is the transfer of any kind of property from one person to another person for current money of the United States."

Fourth.—"I charge you that if you find that a sale was made, and that the sale was the liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors."

Fifth.—"Now, as to the sale by these defendants: You may under this indictment and this evidence if you think the evidence warrants it, after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty, or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in this case."

Sixth.—"Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his servants or employee; that principle applies to a proprietor who has charge of a manufacture and also any institution

where intoxicating liquors are sold; he is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee."

Seventh.—"I charge you further, that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes is the servant, agent, or employee of the proprietor of the establishment, and if either the bartender or the waiter have carried or furnished drinks to any persons or customers in that house, that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment."

Eighth.—"Now, in view of the offer of Mr. Crews, in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled and that you do not misapprehend the law in that regard. The license which is granted under the Internal Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government, and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They, therefore, give to the liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer without having put up his money

and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without a license; so, therefore the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the statute now under consideration."

Ninth.—"And in viewing the testimony you have a right to use your own observation and experience as reasonable and sensible men; you have a right to consider what you know of your own experience of bars and bar fixtures and a saloon outfit is used for."

Tenth.—"You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers."

Eleventh.—"You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere, the use of the electric bell for the purpose of calling a waiter to order the drinks served. It is a matter of every-day occurrence now, just like the telephone and telegraph, through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every-day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony."

Twelfth.—"The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding I charge you that you are the judges of the evidence, and from that evidence it is for you to say whether or not they, or either of them, are guilty."

To all and each of said instructions the defendant duly excepted, which exceptions were duly allowed by the Court.

XI.

That the Court erred in giving the following additional instructions to the jury:

First.—"If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant Endelman, he being the proprietor of the Louvre building, if you find so, then the proprietor is responsible for the acts of the agent or employee so far as such sales are concerned, and is equally guilty with the employee."

Second.—"The principal can be convicted under this evidence if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him."

To all and each of said additional instructions the defendant duly excepted, which exceptions were duly allowed by the Court.

XII.

That the Court erred in denying defendant's motion in arrest of judgment; to the ruling of the Court denying said motion the defendant duly excepted, which exception was allowed by the Court.

XIII.

That the Court erred in denying defendant's motion for a new trial; to the ruling of the Court in denying said motion defendant duly excepted, which exception was duly allowed by the Court.

XIV.

That the Court erred in entering any judgment as pronouncing any sentence against the defendant; to which the defendant duly excepted, which exception was allowed by the Court.

Wherefore, defendant prays that the judgment rendered and entered against him in the above-entitled court and cause be reversed, set aside, and held for naught; that the indictment under which defendant was tried be dismissed, and that the defendant go hence without day, and for such other and further relief as he may in law be entitled to have.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Defendant's Attorneys.

United States of America, }
District of Alaska. } ss.

Due serviceof the within assignment of errors is hereby accepted in the District of Alaska, this 29th day of December, 1896, by receiving a copy thereof duly certified to as such by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,
U. S. District Attorney for Plff.,District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Assignment of errors. Filed January 7, 1897. Charles D. Rogers, Clerk. By Walton D. McNair, Deputy. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

And afterwards, on said date, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to-wit:

No. 612.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants.

Order Allowing Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

Now, on this 7th day of January, 1897, comes the defendants, Max Endelman and Edward Lord, by their attorneys, Messrs. Crews, Hannum & Ivey, and C. S. Blackett, and file herein and present to the Court their petition praying for an allowance of a writ of error intended to be urged by them; praying also for the transcript of the records, proceedings, and papers upon which the judgment herein was rendered, together with all other papers, records, and files in said cause, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and fur-

ther proceedings may be had that may be proper in the premises.

In Consideration Whereof, the Court does not allow the writ of error, and all proceedings in this case shall be stayed and suspended during the pendency of said writ in said Court.

Done in open court at Juneau, Alaska, this 7th day of January, 1897.

ARTHUR K. DELANEY,
Judge of the United States District Court, for the District of Alaska.

And afterward, on said date, a writ of error was issued in said cause, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants.

Writ of Error.

United States of America, ss.

The President of the United States to the Honorable ARTHUR K. DELANEY, Judge of the United States District Court, for the District of Alaska, Greeting:

The cause in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the government of the United States of America, plaintiff, and Max Endelman and Edward Lord, defendants, a manifest error has happened to the great prejudice, injury, and damage of the said defendant, Max Endelman, as is said and appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, together with this writ, so as to have the same at said place in said Circuit on the 6th day of February, 1897, that the record and proceedings aforesaid being inspected, said Circuit Court of Appeals may

cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 7th day of January, 1897

Attest my hand and seal of the United States District Court for the District of Alaska, begun at the clerk's office at Juneau, Alaska, on the day and year last above written.

[Seal] CHARLES D. ROGERS,
Clerk of United States District Court for the District of Alaska.

Allowed.
Dated this 7th day of January, 1897.

ARTHUR K. DELANEY,
Judge of the U. S. District Court, for the District of Alaska.

United States of America, }
District of Alaska. } ss.

Due service of the within writ of error is hereby accepted in the District of Alaska, this 7th day of January, 1897, by receiving a copy thereof, duly certified to as such, by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendant. Writ of error. Filed January 8, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for Defendants. Office, Juneau, Alaska.

And afterwards, on said date, there was issued out of said District Court of Alaska, a citation, which is in words and figures as follows:

No. 612.

In the United States District Court for the District of Alaska.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Citation.

United States of America, ss.

To the Honorable Burton E. Bennett, United States District Attorney for the District of Alaska.

You are hereby cited and admonished to be and appear

at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, on the 6th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, pursuant to a writ of error filed in the clerk's office of the United States District Court for the District of Alaska, wherein Max Endelman and Edward Lord, plaintiffs in error, and the government of the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said defendants, as in said writ of error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable ARTHUR K. DELANEY, Judge of the United States District Court for the District of Alaska, this 7th day of January, 1897.

ARTHUR K. DELANEY,

Judge of the U. S. District Court, for the District of Alaska.

United States of America, }
District of Alaska. } ss.

Due service of the within citation is hereby accepted in the District of Alaska this 7th day of January, 1897, by receiving a copy thereof, duly certified to as such, by C. S. Hannum, one of the attorneys for defendant.

BURTON E. BENNETT,

United States District Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endleman and Edward Lord, defendants. Citation. Filed January 8, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett attorneys for defendants. Office, Juneau, Alaska.

And afterward, to-wit, on January 19, 1897, the following further proceedings were had and appear of record in said cause, to-wit:

No. 612.

UNITED STATES OF AMERICA,
vs.
MAX ENDELMAN and EDWARD LORD,
Defendants,

Order Allowing Extension of Time.

Now, on this day this cause came on to be heard upon the application of Max Endelman, plaintiff in error, for an order to enlarge the time, allowing the clerk of this Court thirty days' additional time to make his return to the writ of error heretofore issued and served in this cause.

It is ordered that the time be, and the same is, hereby

extended for a period of thirty days from the expiration of the time mentioned in said writ.

Dated at Sitka, Alaska, Jan. 19th, 1897.

ARTHUR K. DELANEY,
Judge.

And afterwards, to-wit on said date, the defendant filed his bill of exceptions, which is in words and figures following, to-wit:

No. 612.

In the United States District Court for the District of Alaska

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MAX ENDLEMAN and EDWARD LORD,
Defendants.

Bill of Exceptions.

Be it remembered that at the adjourned November term of the United States District Court, for the District of Alaska, commencing on the 9th day of November, 1896, the Grand Jurors of the United States of America, for the said District of Alaska, on the 8th day of December 1896, returned and caused to be filed in said court a true bill of indictment against the above-named defendants, which indictment is in the following words and figures:

United States of America,
District of Alaska. } ss.

UNITED STATES OF AMERICA,

vs.

MAX ENDELMAN and EDWARD LORD.

23 U. S. Statutes at Large, Chapter 53, Section 14.

At the adjourned November term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord, one thousand eight hundred and ninety-six, begun and held at Juneau, in said district, commencing on the 9th day of November, 1896.

The Grand Jurors of the United States of America, selected, impaneled, sworn, and charged within and for the District of Alaska, accuse Max Endelman and Edward Lord by this indictment of the crime of unlawfully selling intoxicating liquors within said district, committed as follows: The said Max Endelman and Edward Lord at or near Juneau, within the said District of Alaska, and within the jurisdiction of this Court, on or about the 7th day of December, in the year of our Lord, one thousand eight hundred and ninety-six, and at divers other times before, did unlawfully and willfully sell to John Doe and Richard Roe and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown,

an intoxicating liquor called whisky, to-wit, one glass, pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors aforesaid unknown; without having first complied with the law concerning the sale of intoxicating liquors, in the District of Alaska. And so the Grand Jurors duly selected, impaneled, sworn, and charged as aforesaid upon their oaths do say: That Max Endelman and Edward Lord did then and there unlawfully sell intoxicating liquors in the manner and form aforesaid to the said John Doe and Richard Roe, and to divers other persons, whose real names are to the Grand Jurors aforesaid unknown, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

(Signed) BURTON E. BENNETT.
United States District Attorney.

That there is indorsed on the back of said indictment the following words and figures:

"No. 612. United States of America vs. Max Endelman and Edward Lord. Indictment for violating 23 U. S. Statutes at Large, chap. 53, sec. 14. A true bill. Edward De Groff, Foreman of Grand Jury. Witnesses examined before Grand Jurors: C. W. Young, Karl Koehler, Fred Heyde, S. M. Graf." (Signed) "Burton E. Bennett, U. S. Attorney. Filed Dec. 8, 1896. Charles D. Rogers, Clerk."

That prior to the time the defendants were required to plead to said indictment they duly made and caused to be filed with the clerk of said court a motion to quash

said indictment which said motion was based upon the following grounds:

1st That two or more offenses are charged in the same count in the indictment.

2d. That the indictment is fatally defective for duplicity.

3d. That two or more offenses are charged in the same indictment in the same count against the defendants without segregating the offenses committed by each defendant.

4th. That the indictment is too vague, indefinite, and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defense.

That said motion and the questions of law raised thereby were duly argued and submitted to the Court; after duly considering the same the Court made an order denying defendants' said motion; to the ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

That immediately after the making of the order by the Court denying said motion to quash the defendants filed a demurrer to the said indictment upon the following grounds:

1st. That the Court has no jurisdiction over the subject matter of the action.

2d. That more than one crime is charged in the indictment against the defendants in the same count.

3d. That the facts stated in the indictment do not constitute a crime or any crime against the defendants or either of them.

That the Court declined to hear any argument from counsel upon said demurrer and made and caused to be entered an order overruling said demurrer; to the order and ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

That immediately after the entry of the order overruling said demurrer and allowing defendants' exceptions, the Court required said defendants to plead to said indictment; that each of the defendants then and there entered a plea of not guilty.

That thereafter and on the 17th day of December, 1896, this cause came on for trial, and after the jury had been impaneled and sworn to try said cause; whereupon William Hale was called and sworn as a witness on behalf of the prosecution.

That thereupon and before any evidence was introduced the defendants moved the Court as follows:

"That inasmuch as the indictment charges that on or about the 7th day of December, 1896, the defendants sold intoxicating liquors to John Doe, Richard Roe, and other parties, that the district attorney be required to elect

upon what particular sale he chooses to rely for a conviction in this cause." Which motion was denied by the Court; to the ruling of the Court the defendants then and there duly excepted, which exception was allowed by the Court.

Thereupon the defendants interposed the following objections:

"Counsel for the defendants objected to the introduction of any testimony in this cause, for the reason that the indictment does not state facts sufficient to constitute a crime; for the further reason that the defendants have no notice from the indictment upon what charge they are put upon their trial." The objection was overruled by the Court, and the defendants duly excepted, which exception was allowed by the Court.

The prosecution called W. H. Swinehart, who was sworn as a witness on behalf of the United States, and testified that he was the business manager for the Alaska "Mining Record," a weekly newspaper published in Juneau, and knew Max Endelman, one of the defendants, and knew his (Endelman's) place of business. The district attorney then asked the following questions: "From who did you obtain that ad?" (Called the witness' attention to an ad. in the Alaska "Mining Record.") The witness answered: "I didn't obtain the ad. My brother solicited the advertisement." Question. "Did you ever do any collecting on that ad.?" Answer. "Yes, sir." Question. "From whom did you collect?" Answer. "Max Endelman." After which testimony, it being all

the material testimony given by the said witness, the district attorney offered in evidence the advertisement above referred to, which read as follows:

"THE LOUVRE THEATRE.
Max Endleman, Proprietor.
Newest, Most Completely Equipped in Alaska.
Juneau, Alaska.

The latest and Best Vaudeville performances rendered Nightly by the Leading Histronic Artists. Special attractions weekly."

To the introduction of said advertisement in evidence the defendants interposed the following objection:

"Counsel for the prosecution offered in evidence the advertisement above referred to.

"Counsel for the defendants objected to said advertisement, for the reason that the same shows that Max Endelman is the proprietor of the Louvre Theatre, and for the further reason that it is incompetent and immaterial so far as the defendant Lord is concerned, and for the further reason that the proprietorship of the Louvre Theatre, and the proprietorship of the barroom has not been connected, and for the further reason that the foundation for the introduction of the same has not been laid, for it has not been shown that the advertisement was published at the request of the defendant."

Objection overruled by the Court, and defendants duly excepted, which exception was allowed by the Court.

At the close of the evidence on the part of the prosecution the defendants moved the Court as follows:

"Counsel for the defendants moved the Court that the defendants and each of them be discharged at this time, for the reason that the government has failed to make out a case against them, jointly or severally; that the indictment charges Max Endelman and Edward Lord with having violated the prohibitory law of Alaska on and prior to the 7th day of December; that the indictment charges that the defendants sold to John Doe and Richard Roe and other parties; that indictment charges two separate and distinct offenses committed by two separate and distinct individuals at different times, and the testimony in no way has connected them with each other, or has shown any privity or relation between them, but as it stands under the indictment the proof shows them to be two separate and distinct defendants, and shows two separate and distinct crimes committed at different times."

The Court declined to hear defendants' counsel, and made the following remarks in the presence and hearing of the jury:

"By the Court.—In declining to hear counsel for the defendants this morning upon the motions and objections interposed touching the indictment, the Court declined to hear him for the reason that the question as to the validity of the indictment was heard upon a motion to quash after which a demurrer was interposed and overruled; and then upon the former trial before the other jury arguments were presented on motions and objections touching the indictment, and the Court felt on the hearing today that the matter had been sufficiently heard,

and therefore declined to hear further argument. I shall now also deny the motion made by counsel to discharge the defendants."

To the remarks, ruling, and order of the Court the defendants duly excepted which exception was allowed by the Court.

The defendants then interposed the following motion:

"Counsel for the defendants moved the Court that the District Attorney be required as the testimony discloses, an attempt to prove several different sales of liquor at several different times and dates to elect upon what particular sale and what particular time he chooses to rely for a conviction in this case."

Motion denied by the Court, and the defendants duly excepted, which exception was allowed by the Court.

The defendants then made the following offer:

"The indictment charges that Max Endelman and Edward Lord on or prior to the 7th day of December sold intoxicating liquors in the District of Alaska, without first complying with the law; under the indictment as it reads the defendants are not advised as to what law they are charged with violating, whether it is the prohibitory law in the District of Alaska, or section 3242 of the Revised Statutes, and therefore defendants now tender in evidence a license granted by the Collector of Internal Revenue of the District of Oregon, of which Alaska is a portion, authorizing the defendants to sell and retail spirituous liquors in the District of Alaska."

"We desire to offer this to show to the jury that we are not guilty of violating the revenue law; that we have complied with the statute in that respect, having paid out money to the government, and they have received it and by their license have authorized us to engage in the sale of liquor so far as the revenue part of the government is concerned."

That the evidence offered is in the following words and figures:

"$25.00. No. F. 58182.

Series of 1896. Series of 1896.

United States.

[Stamp for Special Tax.]

Internal Revenue Act of October 1, 1890.

Received from Max Endelman the sum of twenty-five-100 dollars, for special tax on the business of retail liquor dealer at Juneau, Alaska, for the period represented by the coupon or coupons hereto attached.

Dated at Portland, July 7, 1896.

HENRY BLACKMAN,

Collector Dist., State of Oregon.

$25—per year. {United States Internal Revenue.}

Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business.

That the coupons referred to as being attached to said evidence so offered are in the following words and figures:

"Coupon for Retail Liquor Dealer's Special Tax for June, 1897.

Coupon for Retail Liquor Dealer's Special Tax for May, 1897.

Coupon for Retail Liquor Dealer's Special Tax for April, 1897.

Coupon for Retail Liquor Dealer's Special Tax for March, 1897.

Coupon for Retail Liquor Dealer's Special Tax for February, 1897.

Coupon for Retail Liquor Dealer's Special Tax for January 1897.

Coupon for Retail Liquor Dealer's Special Tax for Dec., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Nov., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Oct., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Sep., 1896.

Coupon for Retail Liquor Dealer's Special Tax for Aug., 1896.

Coupon for Retail Liquor Dealer's Special Tax for July, 1896."

That there is also printed in red ink upon the face of said written evidence the following words and figures:

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any state for carrying on the said business within such State, and does not authorize the commencement nor the continuance of such business contrary to the laws of such State, or in places prohibited by municipal law. See section 3242, Revised Statutes U. S."

The offer was denied, and the evidence excluded by the Court; to the ruling of the Court the defendants duly excepted, which exception was allowed by the Court.

That after the argument of counsel the Court proceeded to instruct the jury; that in the Court's instructions to the jury he erred in giving the following instructions:

First.—"If you believe from the evidence, beyond a reasonable doubt, that these defendants have sold liquor within the territory of Alaska, contrary to this law, then the defendants are guilty as charged in that indictment.

The fact that it was a glass, pint, or quart cuts no figure, as the law authorizes the allegation to be made in that way."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Second.—"Now, in order to authorize a conviction you want to direct your attention to three propositions:

First.—Has there been a sale? Second. Was the sale an intoxicating liquor? And Third. Was it sold by these defendants or either of them, either in person or through any agent, servant, or employee?"

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Third.—"A sale means, as used in this statute, the ordinary and usual signification of the word; that is, it is

the transfer of any kind of property from one person to another person for current money of the United States."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Fourth.—"I charge you that if you find that a sale was made, and that the sale was liquor commonly called whisky, you must find that it was an intoxicating liquor that was sold, for this Court takes judicial knowledge of the fact that the liquors commonly known as whisky, rum, gin, and brandy are intoxicating liquors."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Fifth.—"Now, as to the sale by these defendants: You may under this indictment and this evidence, if you think the evidence warrants it after I give you the whole of the law, find both or either one of these defendants guilty or not guilty; that is, you may find them both guilty, or you may acquit them both; you may find either one guilty and acquit the other, just as you feel warranted in doing from the evidence in the case."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Sixth.—Now, gentlemen, upon the subject of the principal or the proprietor being liable for the acts of his ser-

vant or employee. That principle applies to a proprietor who has charge of a manufacture and also any institution where intoxicating liquors are sold. He is liable for any and every sale that is made by any and every person that is in his employ, acting for him as a servant, agent, or employee."

To the giving of such instruction the defendants then and there duly excepted, which exception was allowed by the Court.

Seventh.—"I charge you further, that a bartender is an employee and a servant within the meaning of the law. A waiter who carries drinks from the bar and furnishes them to customers in the boxes, he is the servant, agent, or employee of the proprietor of the establishment, and if either the bartender or the waiter have carried or furnished drinks to any persons or customers in that house; that is, assuming the drinks were sold and they received money for them, the principal or proprietor is guilty within the purview of this indictment."

To the giving of such instruction the defendants then and there duly excepted, which exceptions were allowed by the Court.

Eighth.—"Now, in view of the offer of Mr. Crews in behalf of the defendants to introduce the Internal Revenue License Tax, I feel it my duty to see that you are not misled and that you do not misapprehend the law in that regard. The license which is granted under the Internal

Revenue Law is granted for the purpose of raising money to supply the treasury of the United States with funds to carry on the government and to pay the principal and interest on the public debt, and to pay the pensions of the soldiers, and it is one of the methods which Congress has provided for keeping the treasury of the United States in funds. They therefore give to liquor dealers a license, and charge them twenty-five dollars for it, and any person who carries on the business of a retail liquor dealer without having put up his money and got his license is liable under another and different statute from the one which we have under consideration, section 3242 of the Revised Statutes, which provides a punishment much more severe than this statute for any man who carries on the business without a license; so, therefore, the license cuts no figure whatever in this case. You must not consider it at all, because it is no defense to the violation of the Statute now under consideration."

To the giving of such instruction the defendants then and there duly excepted which exception was allowed by the Court.

Ninth.—"And in viewing the testimony you have a right to use your own observations and experience as reasonable and sensible men; you have a right to consider what you know from your own experience of bars and bar fixtures and a saloon outfit is used for."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Tenth.—"You have a right to consider the common practices of proprietors of such establishments in engaging bartenders and employees to wait upon customers."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Eleventh.—"You have a right to take into consideration the practical operation of electricity, the employment of which is a common occurrence everywhere; the use of the electric bell for the purpose of calling a waiter to order the drinks served; it is a matter of every day occurrence now, just like the telephone and telegraph, through which hundreds of thousands of dollars' worth of business is transacted every day. These are matters of every day occurrence, and you have a right to use your own knowledge and experience in that direction in weighing this testimony."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

Twelfth.—"The federal courts allow the Judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury and I will give it to you. I do not see any way that these defendants can be acquitted, notwithstanding, I charge you that you are the judges of the evidence and from that evidence it is for you to say whether or not they, or either of them, are guilty."

To the giving of such instructions the defendants then and there duly excepted, which exception was allowed by the Court.

That after being instructed by the Court the jury retired to deliberate on their verdict; that before agreeing upon the verdict the jury returned into court and requested the evidence of certain witnesses to be read. Whereupon, the testimony was read by the stenographer, after which the Court gave the jury the following additional instructions:

"If you find from this evidence that any intoxicating liquor or whisky was furnished by any agent or employee of the defendant, Endelman, he being the proprietor of the Louvre building, if you so find, then the proprietor is responsible for the acts of the agent or employee, so far as such sales are concerned, and is equally guilty with the employee.

"The principal can be convicted under this evidence, if you find beyond a reasonable doubt that the liquor was sold by his agent, servant, or employee acting for him."

To the giving of each of said additional instructions the defendants duly excepted which exception was allowed by the Court.

After which the jury again retired, and subsequently returned into court with a verdict finding the defendant Max Endelman guilty, and the defendant Edward Lord not guilty.

That thereafter and prior to the entry of judgment by the Court against the defendant Max Endelman, defendant made and filed a motion in arrest of judgment upon the following grounds:

1st. That the Grand Jury, by which the indictment against the defendants was found, had no legal authority to inquire into the crime charged, because the Court has no jurisdiction of the subject matter of the action.

2d. That the facts stated in the indictment do not constitute a crime.

The motion was denied by the Court, and defendant duly excepted which exception was allowed by the Court.

That thereupon the defendant Max Endelman filed his motion for a new trial upon the following grounds:

1st. "Irregularity in the proceedings of the Court during the trial of the defendant; excepted to by the defendant."

2d. "Abuse of discretion on the part of the Court in permitting the prosecution to prove, or attempt to prove, sale of whisky at any time and to any person within one year prior to the finding of the indictment against the defendant, by which this defendant was prevented from having a fair trial."

3d. "Insufficiency of the evidence to justify the verdict."

4th. "That the verdict is against law."

5th. "Error in law occurring at the trial and excepted to by the defendant."

That the Court overruled said motion for a new trial, and defendant duly excepted to the ruling of the Court, which exception was allowed by the Court.

That there was no evidence offered on behalf of the prosecution proving or tending to prove that the defendant Max Endelman ever in person sold to any one any whisky, or any other intoxicating liquors, as charged in the indictment, or otherwise.

That the only evidence offered tending to prove a sale of whisky under said indictment shows that if any whisky was sold it was sold either by the defendant Edward Lord or one James Morrison.

That the following is all the testimony offered, except the testimony of the witness W. H. Swinehart, and the advertisement above referred to in this bill of exceptions, tending to prove that the defendant Max Endelman was the owner, or proprietor, or had any interest in the bar or bar-room situate in the Louvre Theater building, from and over which it is claimed that the whisky was sold:

The witness William Hale testified: "That he knew where the place of business called the Louvre was; that it was on the waterfront in Juneau, Alaska; that there was a theater in the back part of the building and a bar-room in the front part; that the bar-room has a bar and

bar fixtures, glasses, decanters, and mirrors; that there are wide double doors between the bar-room and the theater boxes in the theater, which are connected with the bar-room by electric bells; that there is an elevator running from the bar-room to the upper floor, and that the room above connects with the theatre, and that he had seen beer and whisky sent up in the elevator, and had seen beer and whisky sold over the bar by Edward Lord and James Morrison between July 1st and December 7th, 1896."

The district attorney asked the following questions of the Witness Hale:

"Do you know the proprietor of this place?" Answer. "I do." "Who is he?" Answer. "Mr. Endelman." "The defendant here?" Answer. "Yes, sir."

That the witness Hale upon cross-examination testified that he was United States marshal for Juneau, Alaska, and had held the position for three years, and was holding that position when he saw those sales of liquor made; that they were made in his presence; that he made no arrests nor any attempt to prevent the sale, nor did not command them not to sell liquor in there at that time, or at any time; that he made no attempt to prevent the crime of selling liquor."

The witness Squire Howe testified: "That he had purchased whisky a few times of Edward Lord and Mr. Morrison at the Louvre; that he only knew by reputation who the proprietor of the Louvre was; that he had heard Mr. Endelman was; that he had seen him in there and around

there; that he knew nothing about the relation defendant Lord sustains to the proprietorship of the house (meaning the Louvre), and that he did not know what relation Mr. Endelman sustained to the house."

That the witness William Rudolph testified: "That he had purchased whisky in the theater part of the Louvre of a waiter—he did not know his name; that he touched a button and a waiter came; that he ordered drinks; the waiter went away, came back with drinks, and he (witness) paid waiter for them, and that it occurred in the Louvre, but that he did not know where the drinks came from; that they might have come from George Rice's place, or the bar down stairs."

The witness James Morrison testified: "That he was employed at the Louvre Theatre; that he did not know who the proprietor was; that he was engaged by Max Endleman and had been paid by him; that he did not know of his own knowledge that Max Endelman was the proprietor of the Louvre; that Endelman was around there all the while."

The witness Frank Nugett testified: "That he was a waiter and employed in that capacity by the Louvre Theatre; that Max Endelman employed him and paid him his wages, and that he obeyed his orders; that he worked in the theatre part; and that the theater and the bar-room can be made one place, and that between the hours of eight and twelve o'clock they are one place; that there are boxes arranged in the upper part of the theatre and seats in them for patrons to sit down in; the boxes have

electric bells, did not know exactly where they led to, but thought nearly to the bar-room; that he was employed to wait upon the customers of the theatre. I do not know who constitutes the Louvre Theatre Company, and do not know that Max Endelman is the company or the cashier of the company; only know that he employed me to work for the Louvre Theatre Company."

The witness Edward Kelly testified: "That he had bought stuff of defendant Lord called "whisky" from behind the bar; that he knew nothing about the proprietorship of the Louvre, or any one's connection with it."

The witness Frank Young testified: "That he had purchased whisky of Lord and Morrison; had seen them both behind the bar; had seen Mr. Endelman around there the greater part of the time he (witness) had been there, but did not know who the Louvre Theatre Company was, and did not know that the Louvre Theatre Company had anything to do with the bar, and did not know that Max Endelman was the owner or proprietor of any part of the saloon; that Max Endelman had been in witness' place of business and purchased some hardware and chairs; that he (witness) had seen some of the chairs purchased in the Louvre Theatre; that he did not deliver them; that some one came after them, and that he guessed Max Endelman had paid for them; that he did not know in what capacity Mr. Endelman was acting in relation to the Louvre Theatre Company. He might be agent or cashier."

Richard Johnson testified: "That he purchased liquor of Lord, and had seen Mr. Endelman about the place, but

did not know what relation Lord or Endelman sustained to the company."

John McCormick testifies: "That he had seen liquor sold there, and bought it himself from Mr. Lord, but did not know who composed the Louvre Theatre Company, or any of its officers or agents."

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Attorneys for Plaintiff in Error.

Certificate to Bill of Exceptions.

The foregoing bill of exceptions is correct, and it is hereby agreed that the same may constitute a part of the record in this cause and be certified to the United States Circuit Court of Appeals for the Ninth Circuit.

CREWS, HANNUM & IVEY, and
C. S. BLACKETT,
Attorneys for Plaintiff in Error.
BURTON E. BENNETT,
United States District Attorney for the District of Alaska.

The foregoing bill of exceptions is hereby settled and allowed, and ordered to be made a part of the record in this cause.

Dated at Sitka, Alaska, this 19th day of January, 1897.

ARTHUR K. DELANEY,
Judge.

United States of America,
District of Alaska. } ss.

I, Max Endelman and Edward Lord, being first duly sworn, depose and say that I am one of the defendants in the above-entitled action, and that the foregoing bill of exceptions is true as I verily believe.

Subscribed and sworn to before me this day of January, 1889.

Notary Public for the District of Alaska.

United States of America,
District of Alaska. } ss.

Due service of the within bill of exceptions is hereby accepted in the District of Alaska, this 18th day of January, 1897, by receiving a copy thereof, duly certified to as such by C. S. Hannum, one of the Attorneys for plaintiff in error.

BURTON E. BENNETT,
U. S. Attorney for the District of Alaska.

[Endorsed]: No. 612. In the District Court of the United States for the District of Alaska. United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants. Bill of exceptions. Filed January 19, 1897. Charles D. Rogers, Clerk. Crews, Hannum & Ivey, and C. S. Blackett, Attorneys for defendants. Office, Juneau, Alaska.

Clerk's Certificate to Transcript.

United States of America,
District of Alaska. } ss.

I, Charles D. Rogers, clerk of the District Court of the United States of America, for the District of Alaska, do hereby certify, that the foregoing pages, numbered from one to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The United States of America, plaintiff, vs. Max Endelman and Edward Lord, defendants, as the same remains of record and on file in said office, except the testimony adduced on the trial of said cause.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed, at the town of Sitka in said District, the 17th day of February, A. D. 1897.

[Seal] CHARLES D. ROGERS,
Clerk.

THE UNITED STATES OF AMERICA,
vs.
MAX ENDELMAN and EDWARD LORD.
No. 612.

Clerk's Certificate as to Cost of Transcript.

I, Charles D. Rogers, Clerk U. S. District Court, District of Alaska, do hereby certify, that the cost for preparing the transcript in the above-entitled cause is seventeen dollars, which amount I have received from Max Endelman, one of the above-named defendants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court.

[Seal] CHARLES D. ROGERS,
Clerk U. S. District Court.

[Endorsed]: No. 357. United States Circuit Court of Appeals for the Ninth Circuit. Max Endelman and Edward Lord, Plaintiffs in Error, v. The United States of America, Defendants in Error. Transcript of Record. In Error to the District Court of the United States for the District of Alaska.

Filed March 1st, 1897.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.